

A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights

Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*

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Introduction

During the 50th anniversary of the Universal Declaration of Human Rights (UDHR) in 1998, Baxi warned that contemporary human rights is being supplanted by '...a trade-related, market-friendly, human rights paradigm' (Baxi 1998: 125 at 163). According to him, the new paradigm requires states to pursue the 'three Ds' of globalisation (deregulation, de-nationalisation and disinvestment), in order to free as much space as possible for global capital (Baxi 1998: 125 at 164).

Baxi further argues that while the bourgeois supplanting of hard-won human rights for its own end may not be a new phenomenon, the present appropriation is, however, different in that it legitimises 'extraordinary imposition of human suffering in the cause and the course of the present contemporary march of global capital' and regresses the future of contemporary human rights in the process (1998: 125 at 168–169). Subsequent events appear to be proving Baxi right as neo-liberalism is today one of the biggest impediments to the realisation of socio-economic rights in most of the places that the rights are needed (see for instance, Pieterse 2003: 3 at 15–16).

It was at first thought that South Africa had charted a different course when it entrenched and made justiciable a catalogue of socio-economic rights in its 1993 Interim Constitution and later in the 1996 Final Constitution of the Republic of South Africa (the South African Constitution). This is because it is said that the tenor and true meaning of the South African Constitution require a social democratic political vision rather than the dominant liberal democratic one (Klare 1998:146 at 164–165). One of the distinguishing features of the former type of political vision is the socio-economic transformation of the society, which was expected to trump neo-liberal ideals and policies where the two come into conflict. There is evidence, however, that both the South African government and the courts, especially the Constitutional Court, have declined to read the South African Constitution in that way. Both have instead subsumed the transformative ideals of the

Constitution under neo-liberal laws and policies. Thus, while the South African government has been busy pursuing the neo-liberal 'three Ds' referred to above through laws and policies, the Constitutional Court has been busy aiding and abetting the government through its decisions. The resultant effect of this, of course, is the apparent deepening of poverty of South African citizens. The most conspicuous of such cases is the decision of the Constitutional Court in *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) (*Mazibuko*).

Conversely, in Nigeria, which has a supposedly weaker form of socio-economic rights framework and protection, a court in the recent case of *Bamidele Aturu v Minister of Petroleum Resources* (Suit No: FHC/ABJ/CS/591/09) (*Bamidele Aturu*) struck down the Nigerian government's deregulation of the downstream sector of the petroleum industry as unconstitutional. This is because the policy violates the socio-economic objectives of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the Nigerian Constitution).

The purpose of this short essay is to compare the two above-mentioned cases with a view to deducing what lessons South African courts could to learn from the Nigerian case.

Background to and the decision of the Constitutional Court in *Mazibuko*

That South Africa has a justiciable socio-economic rights regime is a notorious fact that needs no proof, recapitulation or restatement here. What needs to be emphasised here is that, despite the justiciable nature of socio-economic rights in South Africa, the face of neo-liberalism has always been vaguely discernible behind the mask of the Constitutional Court's socio-economic rights jurisprudence. This position stems from the Court's reluctance to impose any positive obligations to provide on the state in most of the socio-economic rights cases that have come before it, preferring to police only the state's negative obligations in relation thereto. That this is actually the case is clearly apparent from and confirmed by the Court itself in *Mazibuko*. One of the pronouncements of the Court in *Mazibuko* that is instructive in this regard is quoted below thus:

In *Treatment Action Campaign No 2*, the Court did order the government to make Nevirapine available at clinics subject to certain conditions. But it did so because government itself had decided to make Nevirapine available, though on a restricted basis, and the Court found that there was no reasonable ground for that restricted basis. Moreover Nevirapine was, at least for a period, being made freely available to government by its manufacturer. In a sense, then, all the Court did was to render the existing government policy available to all (*Mazibuko*: para 64. Emphasis supplied).

The above pronouncement clearly confirmed that the Constitutional Court has been and is unprepared to impose on the state any positive obligation to provide basic necessities of life to those in dire need of it, contrary to the stipulations of the South African Constitution.

Thus, while neo-liberalism has hitherto peeped from behind the mask in most of the Court's previous socio-economic rights decisions, it is in *Mazibuko* that it fully bares its fangs. It is to this case that I now turn with a brief discussion of the facts, the decision of the Court and the implication of the decision for South Africa's socio-economic rights regime.

Mazibuko concerns the commercialisation by the state of the provisions of water in Phiri, one of South Africa's poorest suburbs. (A summary of this case is provided in *ESR Review* (10)4.)

The trial Court found for the applicants on both grounds of objections and declared the scheme unconstitutional. The Court held that six kilolitres of free water per household per month is insufficient for a dignified life and that the installation of prepaid meters was unlawful. The trial Court therefore ordered that the respondents provide the applicants and other similarly situated residents of Phiri with free water supply of 50 litres per person per day and the option of a metered supply of water that was to be installed at the respondents' cost, among other remedies. The respondents appealed against this decision to the Supreme Court of Appeal (the SCA). The SCA upheld the judgment of the trial High Court in substantially similar terms, save that the SCA held that 42 litres of water per person per day is sufficient water in terms of section 27(1)(b) of the South African Constitution. The SCA ordered accordingly.

Upon further appeal by the respondents, the Constitutional Court reversed the two lower Courts and found against the applicants. According to the Constitutional Court, both the trial High Court and the SCA erred in holding that the six kilolitres of water per month prescribed by the respondents and the installation of prepaid water meters were unconstitutional. The Court held, among other things, that the sufficiency or otherwise of the prescribed amount of free water by the respondents or any measures taken by the government to preserve a scarce commodity like water is exclusively within the competence of the government and cannot be questioned because the South African Constitution does not confer a right to claim sufficient water or impose any obligation on the state to pro-

vide sufficient water to anyone immediately or without more (*Mazibuko*: paras 56–57).

There are at least three implications of *Mazibuko* for South Africa's socio-economic rights regime. The first is that it legitimates and sanctions neo-liberalism. In effect, the Constitutional Court told the government in very clear language that it can forge ahead with neo-liberal laws and policies notwithstanding any negative impact on constitutionally guaranteed socio-economic rights.

The second implication is that *Mazibuko* has turned socio-economic rights in South Africa into a privilege, something that can only be enjoyed at the pleasure of the government. Granted, it may be argued that some of the provisions guaranteeing socio-economic rights in the South African Constitution contained internal limitation clauses making the enjoyment of the rights subject to the availability of resources. While this is true, the consistent and persistent reluctance of the Constitutional Court to question the discretion and policy decisions of the government in the allocation of scarce resources has converted the government into the final authority on the issue. The effect of this is to transform the government into an Alpha and Omega as far as realisation of constitutionally guaranteed socio-economic rights is concerned. This is contrary to all notions and conceptions of rights as entitlements.

The third implication flows from the first two. It is that *Mazibuko* has consequently converted South Africa's socio-economic rights into mere paper rights, existing in the texts of the South African Constitution without corresponding effect or impact on supposed right bearers.

The background to and decision of the Court in *Bamidele Aturu*

Nigeria is generally believed to have a non-justiciable socio-economic rights regime. Like the Indian Constitution, the socio-economic rights regime of Nigeria is contained in the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Nigerian Constitution (Chapter II). Like the Indian Constitution also, section 6(6)(c) of the Nigerian Constitution prohibits judicial enforcement of Chapter II of the Constitution. Nigerian appellate courts have confirmed this reading of the Constitution in several cases.

The implication of the foregoing state of the law for socio-economic rights enforcement in Nigeria is that no question as to whether any obligation under Chapter II is being complied with or given effect to can be raised before any court of law in Nigeria – let alone invalidating any law or policy of government as inconsistent with the provisions of the Chapter. It is against this backdrop that the case of *Bamidele Aturu*, delivered on 19 March 2013, becomes very important. The case declared the neo-liberal policy of deregulation of the downstream sector of Nigeria's petroleum industry as illegal and unconstitutional on the ground that it violates the obligation of the government of Nigeria to regulate and fix the prices of petroleum products in a manner that will secure the maximum welfare, freedom

and happiness of every citizen, pursuant to section 16(1) of the Nigerian Constitution and other existing statutes. The background to the case is briefly explained below.

Oil occupies a prominent and very important place in the socio-economic well-being of Nigeria and Nigerians – so much so that some scholars have rightly opined that: '[n]ational and personal dreams, hope and aspiration are built around oil' (Ering and Akpan 2012:12 at 13). This importance is evidenced by the fact that as at 2010, oil resources contributed about 99% of government revenues and about 38.8% of the country's GDP (Ering and Akpan, 2012:12). Consequent upon this centrality of oil resources to personal and national socio-political life in Nigeria, the pricing of petroleum products have always been a very thorny issue. While governments have always tried to maximise revenue through incessant increases in the price of petroleum products, individuals and civil-society groups have always resisted because of the prejudicial impact on the majority of the people, who are poor. Constitutional politics/litigation has recently become one of the means of resistance.

The *Bamidele Aturu* case was instituted by the applicant in the Federal High Court, Abuja (the Court) in 2009 to challenge the incessant fuel price increases and the Nigerian government's neo-liberal policy of deregulation of the downstream sector of the petroleum industry. The applicant argued that this policy of deregulation was illegal and unconstitutional in view of the combined provisions of section 16(1) of the Nigerian Constitution and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act, respectively. These, according to the applicant, oblige the government to regulate and fix, from time to time, the price of petroleum products in such a way as to secure the maximum welfare, freedom and happiness of every citizen of Nigeria. The defendants, for their part, opposed the claim of the applicant on three main grounds: firstly, that he had no *locus standi*; secondly, that the suit disclosed no cause of action; and thirdly, that the suit was improperly constituted. Although this is not the first time that Nigeria's policy of deregulation of the downstream sector of the petroleum industry was challenged in court, it was the first time that the constitutionality/legality of the policy was the primary subject matter of a constitutional challenge. It was also the first time that such a challenge was clearly articulated and that it met with a measure of success.

In finding for the applicant and dismissing the objections of the defendants, the Court held that on both the private rights and public interest view of *locus standi*, the applicant was properly before the court and had the requisite *standi* to maintain the action. In this regard the Court relied on the republican (communitarian) conception of democracy aspects of *Adesanya v President of Nigeria* [1981] 2 NCLR 358 and *Fawehinmi v The President of the Federal Republic of Nigeria* (2008) 23 WRN 65.

On the issue of whether the applicant's suit disclosed a cause of action, the Court held that the issue of *locus standi* is intertwined with that of cause of action and that since the *locus* of the applicant was already established, it neces-

Deregulation of the downstream sector of Nigeria's petroleum industry was declared illegal and unconstitutional.

sarily meant the Court was satisfied that a cause of action was established by the applicant against the defendant. The Court also held that the suit was properly constituted.

On the substantive issue of the legality/constitutionality of the government's deregulation policy, the Court held, agreeing with the applicant, that the combined reading of the provisions of section 16(1) of the Nigerian Constitution and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act respectively obliged the government to regulate and fix, from time to time, the price of petroleum products in Nigeria in such a manner as to secure the maximum welfare, freedom and happiness of Nigerian citizens. On the argument of the defendants that the economic objective of the state in section 16(1) of the Constitution is not justiciable, the Court, relying on the Supreme Court of Nigeria decision in *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222, held that the provisions of Chapter II of the Constitution can be made justiciable via legislation. The Court therefore held that the provisions of sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively had made justiciable the non-justiciable provisions of section 16(1) of the Constitution.

What is clear from the Court's decision is that the Constitution and extant laws provide for a centralised/regulated economy in Nigeria. The true meaning and purport of this regulation, in the Court's view, is to secure for every citizen of Nigeria maximum welfare, freedom and happiness. This forbids or forecloses mercantilistic or neo-liberal agendas or policies, which do not take the maximum welfare, freedom and happiness of citizens into consideration in furtherance of section 16(1)(b) of the Constitution. The Court's message to the government in this regard is very clear: 'If you want to go the capitalist way you have to change the laws and the Constitution'.

An appeal against this decision is currently pending before the Nigerian Court of Appeal.

While the full implication of this decision for the Nigerian government's neo-liberal drive is still unravelling, it is submitted that the decision holds some very serious implications for the Nigerian socio-economic rights regime, some of which are considered below.

The first implication of *Bamidele Aturu* is the immediate transformation of the country's non-justiciable socio-economic rights regime into, at least, a quasi-constitutional one. This contention is based on the fact that the

South African courts should take the welfare, happiness and socio-economic well-being of citizens as a foundational value.

African Charter on Human and Peoples' Rights (the Charter), which Nigeria has domesticated, did not make the traditional distinction between civil and political rights and socio-economic rights in its provisions. The effect of this is to make the provisions of the Charter part and parcel of the domestic law of Nigeria. This position of the law has been confirmed by Nigerian courts in many cases. There is, however, a continuing and raging controversy on whether the socio-economic rights in the Charter have also become part and parcel of the domestic law of Nigeria, notwithstanding the provisions of section 6(6)(c) of the Constitution (see generally Azinge 2010).

Be that as it may, if the reasoning of the Court in *Bamidele Aturu* on the justiciability of section 16(1)(b) of the Constitution through the combined provisions of sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively is followed, it seems that the domestication of the Charter has made justiciable at least those socio-economic rights provisions in Chapter II of the Nigerian Constitution which have counterparts in the Charter.

The second implication is the humanisation of the Nigerian government's neo-liberal drive and capitalist policies. This is through the subjection of its neo-liberal programmes to the constitutional dictates of maximum welfare, freedom and happiness. As stated by the Court above, the underlying reasons for the government's economic policies and objectives, as contained in section 16(1)(b) of the Constitution, are to secure the maximum welfare, freedom and happiness for all citizens. Consequently, any policy that will negatively impact on these constitutional requirements will be null and void. This is specifically the case with regard to the Nigerian petroleum sector via the combined reading of section 16(1)(b) of the Constitution and sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively. It can be argued that it is also generally the case in all other spheres of Nigeria's economy through the combined reading of section 16(1) of the Constitution and the relevant provisions of the Charter.

The third implication of the decision, and by far the most radical, is that it appears to implicitly outlaw neo-liberalism, which is probably the biggest enemy of the socio-economic rights of the poor. The Court is in this regard unequivocal that the Constitution provides for a regulated economy, the purpose of which is to secure the maximum welfare, happiness and freedom of the citizens, which seems to be the very anti-thesis of neo-liberalism. This means that either the former or the latter must give

way. And since Nigeria is a constitutional democracy with a supreme Constitution, it is neo-liberalism that appears to be on its way out, at least until an appellate court overrules the decision or a Constitution that is more compatible with neo-liberalism is enacted.

Lessons for South African courts

To properly identify what lessons there are for South African courts from *Bamidele Aturu*, the distinguishing features of the case should first be pointed out. There are at least three features of the case that sets it apart from *Mazibuko*.

The decision, true to the character of fundamental objectives, regards the provisions of Chapter II of the Nigerian Constitution as the very basis of all laws and policies in Nigeria; ideals to which all laws and policies must aspire (see for instance De Villiers 1992: 29 for a detailed discussion of the nature and character of fundamental objectives).

The case humanises the neo-liberal policies and agenda of the government by taking the maximum welfare, happiness and freedom of citizens as the *raison-d'être* of governmental exercise of power. That is, the decision takes human beings as the primary focus of economic development in tandem with the views of some eminent scholars who have in fact argued that the best route to robust and all-round economic development is the human focussed or human capability development strategies/approaches (Sen 2001; Nussbaum 2000). This appears to be the approach that the Court has taken.

The Court boldly assumed jurisdiction to interrogate the rational basis and policy decisions of government vis-à-vis its constitutional obligations to engage with social hardship.

There are thus at least three lessons that South African courts can learn from *Bamidele Aturu*.

South African courts should take the welfare, happiness and socio-economic well-being of the citizens as a foundational value, as is done in *Bamidele Aturu*. Granted, the South African Constitution has no provision identical to the provisions of section 16(1)(b) of the Nigerian Constitution, yet there are in fact ample provisions in the South African Constitution with similar effects. Section 7(1), for example, refers to the Bill of Rights as the cornerstone of South African democracy and affirms the democratic values of human dignity, equality and freedom; section 7(2) obliges the South African state to '...respect, protect, promote and fulfil the rights in the Bill of Rights'; and section 8(1) makes the provisions of the Bill of Rights applicable to all laws and binds all organs of state. Important in this regard also are the provisions of section 39(2) which mandate every court, tribunal or forum to promote the values and objects of the Bill of Rights when interpreting any legislation or developing the common law or customary law.

To all intent and purposes, therefore, the above provisions and similar ones in the South African Constitution seek to constitute the Bill of Rights as the ideal or end to which all laws and policies in South Africa must follow. Any law, policy and governmental exercise of powers not in tandem therewith ought to be null and void except regarding such limitations as can be justified as necessary in a

democratic society. Thus, the argument that South African courts should regard the socio-economic well-being of citizens as a foundational value appears to be even stronger in South Africa than in Nigeria having regard to the provisions referred to above.

South African courts should adopt interpretive approaches that humanise neo-liberal policies and laws. Absences of identical provisions still notwithstanding, there are also robust constitutional authorities for South African courts to adopt this approach. According to section 1(a) of the South African Constitution, human dignity, equality and human rights and freedoms are foundational values underlying the Constitution. This affirmation is reinforced through further providing for the rights of equality (section 9(1)), human dignity (section 10) and freedom and security of the person (section 12) in the Constitution's substantive provisions. The Constitutional Court itself has confirmed this reading of the South African Constitution (see for instance, *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 paras 23–25). The Court has also stated that the lack of the basic necessities of life, such as decent jobs, adequate shelter, adequate health services, an adequate social security system and access to clean water, among others, are a gross negation of these foundational values (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8). There is robust literature in support of the fact that unbridled neo-liberalism is responsible in contemporary times for the lack or cessation of basic necessities of life in many parts of the world (Pieterse 2003: 3). From the foregoing, the humanisation of neo-liberal laws and policies appear in fact to be a constitutional imperative in South Africa.

Finally, South African courts should not fight shy of assuming jurisdiction to question the discretion of the governments in the allocation of resources or formulation of policies where socio-economic rights are in issue.

This is because, contrary to the assumed position of the Constitutional Court, the literature indicates that courts are political institutions with policy making functions and capabilities (Dahl 1957: 279). Eminent scholars have also pointed out that judicial scrutiny of governmental policies and programmes in relation to socio-economic rights is in fact a constitutional imperative. According to Mureinik, a Bill of Rights is meant to spearhead efforts to bring about a culture of justification and accountability in governance (1994: 32). Reluctance by courts to question the discretion, appropriateness, sufficiency or methodology of governmental policies and allocation of scarce resources in socio-economic rights cases may well be an abdication of constitutionally imposed duties and an unjustified dilution of socio-economic rights in South Africa.

Concluding remarks

As seen from *Mazibuko*, neo-liberalism may well become the Achilles' heels of socio-economic rights enforcement and realisation in South Africa in spite of the transformative vision and ideals of the Constitution. This result is, however, not inevitable as *Bamidele Aturu* from Nigeria's supposedly weaker socio-economic rights framework has shown. The court in *Bamidele Aturu* recently declared the neo-liberal policy of the deregulation of the downstream sector of Nigeria's oil industry unconstitutional because the policy violates Nigeria's government's constitutional obligation to secure the maximum welfare, happiness and freedom of Nigerians.

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